COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1458

ADOPTION OF ZAHARA.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a trial in the Juvenile Court, the judge found the mother unfit to parent the child, terminated her parental rights, and approved the Department of Children and Families' (department) plan of adoption by the child's current foster parents.[2] On appeal, the mother claims that the judge abused his discretion by terminating her parental rights because there was not clear and convincing evidence of the mother's unfitness. We affirm.

1. Unfitness and termination of parental rights. The mother claims that the judge's finding of unfitness was not supported by clear and convincing evidence and was based on clearly erroneous subsidiary findings that attributed responsibility to the mother for the child's elevated lead levels. The mother also claims that her lack of cooperation

[1] A pseudonym.

[2] The father's parental rights to the child were also terminated but he is not involved in this appeal.

with the department and failure to attend the trial does not provide clear and convincing evidence of her unfitness. We disagree.

A decision to terminate parental rights calls for a two-step analysis. See G. L. c. 210, § 3; Adoption of Nancy, 443 Mass. 512, 515 (2005). "To terminate parental rights to a child and to dispense with parental consent to adoption, a judge must find by clear and convincing evidence, based on subsidiary findings proved by at least a fair preponderance of evidence, that the parent is unfit to care for the child and that termination is in the child's best interests." Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). "In determining whether the best interests of the child[] will be served by a decree dispensing with the need for consent, a 'court shall consider the ability, capacity, fitness and readiness of the child's parents . . . and shall also consider the plan proposed by the department or other agency initiating the petition.'" Adoption of Nancy, supra, quoting G. L. c. 210, § 3 (c). "We review the judge's findings with substantial deference, recognizing [the judge's] discretion to evaluate a witness's credibility and to weigh the evidence." Id.

Here, the findings of fact and conclusions of law are "specific and detailed so as to 'demonstrat[e] that close attention has been given the evidence.'" Care & Protection of

Martha, 407 Mass. 319, 327 (1990), quoting Care & Protection of Stephen, 401 Mass. 144, 151 (1987). We see no abuse of discretion or clear error of law. See Adoption of Hugo, 428 Mass. 219, 225 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999).

The department became involved with the child when a G. L. c. 119, § 51A, report (51A report) was filed by an early intervention worker who had suggested to the parents that the child be tested for lead; the test confirmed that the child had elevated lead levels.[3] The 51A report included a statement that the parents "almost seemed excited" about the child's lead level and that they talked about potential lawsuits and using the money to buy things. The judge found that the 51A reporter "was under the impression that the parents reacted inappropriately to the news of [the child's] lead levels, allegedly talking about potential law suits and using the money from any suits to buy frivolous things." The mother argues that the judge improperly relied on the 51A reporter's statement and that the parents' alleged improper response clouded the case in its entirety, as it was included in another 51A report and throughout the record.[4]

[3] The first test showed a lead level of twenty-eight, and the second test showed a lead level of twenty-nine. Normal lead levels are believed to be below ten, and below five is optimal.

[4] A second 51A report made similar allegations regarding the parents' response when learning about the child's elevated lead levels.

However, the judge noted that "[t]he Court does not necessarily find that the parents made such statements and uses them only as the basis for the reporter's and Department's concerns." This is a proper use of 51A reports, which "are admissible to 'set the stage' to explain how the department became involved with the family." Adoption of Querida, 94 Mass. App. Ct. 771, 778 (2019), quoting Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990).

The mother also claims that the findings regarding the paper used in the child's room to mitigate lead exposure and maintenance work inside the apartment were clearly erroneous. While the ultimate finding of parental unfitness must be proved by clear and convincing evidence, subsidiary findings must be proved by at least a fair preponderance of the evidence. Adoption of Jacques, 82 Mass. App. Ct. at 606.

The challenged findings here are amply supported. First, the finding that paper had been put up in the child's room over a window and window sill, to ensure that lead paint chips or dust could not fall, is an accurate description of what occurred in the child's room. The mother argues that this finding is clearly erroneous because keeping the paper up was not part of the de-leading process after the family moved back into the apartment. The challenged finding, however, does not provide a timeline of when the paper was put in place, only that the paper

was put in place to protect the child from exposure to lead and paint chips. Moreover, the mother acknowledged to department workers that she and the father were unable to keep up the paper protection in the child's room, and that she was unable to supervise the child because she had household duties. The mother reported to the department that the child would eat the paint chips when the paper was not in place, causing the child's heightened lead levels. The mother's inability to protect the child from further lead exposure is relevant and the department was concerned that not all measures were being followed to limit the child's exposure to lead.

The mother claims that the finding regarding the father doing maintenance work in the apartment and the presence of other maintenance workers inside the apartment was clearly erroneous. This finding is supported by a fair preponderance of the evidence as a social worker testified that he had spoken with the father about the Department of Public Health's (DPH) concerns regarding the dangers of doing maintenance work because it could create lead dust. The father acknowledged that he had been doing work in the closets. There is also evidence that an electrician came to fix a light. The apartment was inspected by DPH on October 9, 2015, and had been deemed no longer contaminated with lead, but when DPH tested the apartment on December 9, 2015, it found that the entire apartment was again

contaminated with lead dust. The subsidiary findings are not clearly erroneous, and taken together, support a conclusion that the child was severely lead poisoned and that the parents were unable to supervise her or mitigate the risk of further harm to her.[5]

The judge also based his finding of unfitness on several additional factors. The mother did not fully engage in her service plan tasks after the department opened the case. The mother failed to participate in counselling and exhibited uncooperative behavior with the child's early intervention workers, department workers, and medical providers. While the mother ensured that the child attended her medical appointments, the mother was frequently verbally abusive and combative with medical providers, including during blood draws to determine the child's lead levels. When the child was removed from the parents' custody, the mother's service plan tasks were updated to include that she complete a psychological evaluation, a parenting evaluation, a parenting education class, and domestic violence education. The department never received confirmation that the mother completed the psychological evaluation, though

[5] The child's lead levels were consistently high: June 2, 2015 -- 28; June 11, 2015 -- 26; June 26, 2015 -- 29; July 31, 2015 -- 27; October 7, 2015 -- 19; December 2, 2015 -- 28.

the mother had begun the evaluation.[6] The mother also did not fully comply with the counselling service plan task as she did not get on a waitlist until nearly six months after the child had been removed from her custody. The mother's failure to completely engage in service plan tasks is relevant to the determination of unfitness and termination. See Adoption of Rhona, 63 Mass. App. Ct. 117, 126 (2005). The purpose of the service plan tasks was to allow the department to make a full evaluation of the mother and to assess and remedy her failure to protect the child from lead exposure. The apartment was also frequently dirty and DPH found the apartment to be cluttered and in a "deplorable condition" with the new carpet "soiled and covered with debris."

Additionally, the visitation between the parents and the child were indefinitely suspended on June 20, 2017, by order of the judge on a joint motion by the department and the child, due to the child's poor reactions to the visits.[7] The child had at one visit refused to enter the visit room and repeatedly said,

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[6] The mother provides a letter from a domestic violence counsellor saying that the mother reported no history of domestic violence and that there was no need for services. However, the mother had reported incidents of the father's anger and violence to the department.

[7] In the order suspending visitation, the judge found that "continuing visitation would be harmful to the child." The judge took judicial notice of his findings in the order suspending visitation in the decision to terminate parental rights.

"[N]o mommy, no daddy," until the child was prompted by the social worker and the visit began. On another date, the child covered her face and grabbed onto the social worker's leg when the social worker tried to start the visit. The social worker found later that the child had defecated in her diaper even though she was toilet trained. In the order suspending visitation, the judge found that the child had a diagnosis of posttraumatic stress disorder (PTSD) and that there was a nexus between the child's PTSD symptoms and the visits.

The mother claims that the judge improperly drew a negative inference from her failure to attend the trial. However, it is not clear that the judge drew such an inference. The judge only noted that the mother did not attend the trial and did not appear physically or telephonically after December 17, 2015.[8] In any event, the judge would have been allowed to draw an adverse inference from the mother's absence from the trial. See Adoption of Talik, 92 Mass. App. Ct. 367, 371 (2017) ("an adverse inference may be drawn against a parent who, despite having received notice, is absent from a child custody or termination proceeding"). "[T]he absence may suggest that the

[8] On the first day of trial, the mother filed a motion for a change of venue based on difficulty obtaining transportation to the Franklin/Hampshire County Juvenile Court. The change of venue motion was denied but the judge allowed the mother to participate via telephone.

parent has abandoned [her] rights in the child or cannot meet the child's best interests." Id. at 372.

The mother also claims that the judge improperly relied on the child's attachment to the foster parents and a comparison between the parents and the foster parents. We disagree. "Although the bonding of a child with foster or adoptive parents is not a dispositive consideration, it is a factor that has weight in the ultimate balance." Adoption of Nicole, 40 Mass. App. Ct. 259, 262-263 (1996). With her foster parents, the child's most recent lead level was ten, and her autism diagnosis was changed to environmental autism. The child is regularly seeing doctors to address her medical conditions, and she has also made improvements in her vocabulary and communication skills. The judge properly considered the child's bond with her foster parents and the child's improved condition since her placement with them in determining the child's best interests. See G. L. c. 210, § 3 (c). See also Adoption of Terrence, 57 Mass. App. Ct. 832, 835 (2003) (judge "may . . . take into account the child's condition while living with [her] mother as contrasted with [her] development after removal from her care").

In sum, the judge's determination that the mother was unfit was supported by clear and convincing evidence. The judge made detailed and thorough findings, supported by the record, and

considered a "constellation of factors" to conclude that the mother was unfit and that termination was in the child's best interests. Adoption of Greta, 431 Mass. 577, 588 (2000). Any additional claims of error are either without merit or harmless; the judge's findings regarding parental unfitness are otherwise amply supported by the evidence.

Decree affirmed.

By the Court (Green, C.J., Meade & Singh, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: June 10, 2019.

[9] The panelists are listed in order of seniority.